

ENVIRONMENTAL LAW

Lewis & Clark Law School

VOLUME 45

SUMMER 2015

NUMBER 3

ARTICLE

- A Dry Century in California: Climate Change, Groundwater, and a
Science-Based Approach for Preserving the Unseen Commons.... 641
John J. Perona

In January 2015, California became the last Western state to adopt a comprehensive plan for managing its groundwater resources. With passage of the Sustainable Groundwater Management Act, the legislature overcame a century of resistance to impose substantial state-level regulatory control. The law vests authority in new local groundwater sustainability agencies, which must prepare sustainability plans for the over 100 aquifers presently experiencing critical declines in water levels. Under these plans, the statute contemplates that, among other criteria, withdrawals from aquifers must be managed to avoid both significant and unreasonable depletion of water storage levels and adverse effects on surface flows. This Article argues that the key standard imposed to meet these objectives, the sustainable yield, is fundamentally flawed because it specifies allowed withdrawals in terms of base periods representative of long-term conditions in each basin. However, such long-term conditions are no longer definable given twenty-first century climate models that predict sustained, increasing drought in the most populous parts of the state. To slow, and ultimately halt, the ongoing sharp declines in aquifer water levels, this Article suggests that the sustainable yield standard should be replaced with mandated, numerical criteria specifying defined levels of groundwater to be retained in each individual basin. This approach will require substantial, targeted efforts to gather missing data on the hydrological properties of aquifer basins across the state. It ultimately envisions a fully science-based approach to conjunctive management of ground and surface waters in California.

ESSAY

- Regulating for Sustainability..... 663
George B. Wyeth & Beth Termini

In 2011, the National Academy of Sciences recommended that the United States Environmental Protection Agency (EPA) consider sustainability in its actions and decisions, and the Agency is now taking steps to do so. However, this is harder than it might seem, particularly for the regulatory programs that are EPA’s core line of work. While voluntary programs promoting energy efficiency or pollution prevention fit comfortably with such a goal, the relationship between regulation and sustainability is more complex. If anything, experience suggests that there are tensions between them. Sustainability initiatives tend to be characterized by innovation, adaptability, continuous change and systemic thinking, and these are not always easy to harmonize with a statutorily driven, top-down regulatory system addressing specific issues in a narrowly-targeted way.

This Essay analyzes the challenges of using regulatory programs to promote sustainability, looking at how regulatory programs have dealt with those challenges in the past—sometimes successfully and sometimes less so. It concludes that advancing sustainability is not always a natural role for environmental regulatory programs; “win-win” opportunities in a regulatory setting may be the exception rather than the rule. However, it also concludes that, based on the Agency’s past history, opportunities can be found and that EPA should look for ways to take advantage of them where it can. This can be done in part by establishing new requirements, but more often by enabling, facilitating and incentivizing the initiatives undertaken by others. Sometimes this can be done by writing rules in ways that permit or even encourage innovation; in other cases it requires case by case tailoring. The challenges are real, but at a minimum the opportunities should not be overlooked, and should be affirmatively sought out by the Agency and its stakeholders.

2014 NINTH CIRCUIT ENVIRONMENTAL REVIEW

INTRODUCTION	721
--------------------	-----

CASE SUMMARIES	723
----------------------	-----

CHAPTERS

Preliminary Injunctions in Environmental Lawsuits: The Ninth Circuit’s Discretionary Approach in <i>League of Wilderness Defenders v. Connaughton</i> <i>Lindsay Bregante Myers</i>	793
--	-----

The Ninth Circuit Court of Appeals’ recent decision in *League of Wilderness Defenders v. Connaughton* exemplifies its continued resistance to the Supreme Court’s approach to preliminary injunctions. This Chapter analyzes the Ninth Circuit’s discretionary approach to preliminary injunctive relief, despite Supreme Court precedent in

Winter v. Natural Resources Defense Council requiring courts to apply an inflexible, four-factor test. Through a detailed discussion of each part of the four-factor test, this Chapter shows that the Ninth Circuit did not faithfully apply the Supreme Court’s preliminary injunction standard and that certain factors remain unclear. Finally, this Chapter concludes that environmental plaintiffs in the Ninth Circuit have benefited from the lack of clarity, but should be wary of unsettled legal standards when seeking preliminary injunctive relief.

Ripening Green Litigation: The Case for Deconstitutionalizing Ripeness in Environmental Law.....	811
<i>Nora Coon</i>	

The justiciability doctrines of standing and ripeness routinely prevent courts from reaching the merits of environmental cases. In 2014, the Ninth Circuit dealt with the legal sources of standing and ripeness in *Montana Environmental Information Center v. Stone-Manning*. Affirming the lower court’s dismissal of a challenge to the possible approval of a surface mining permit, the Ninth Circuit ascribed ripeness to the Article III limitation on federal jurisdiction. This Chapter uses the case as a lens to examine the elision of standing and ripeness in the Ninth Circuit. It argues that the Ninth Circuit should abandon the tripartite structure that it currently employs—standing, constitutional ripeness, and prudential ripeness—and instead recognize only two doctrines: an Article III standing doctrine and a prudential ripeness doctrine.

NINTH CIRCUIT INDEX	843
---------------------------	-----